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258-249—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1052

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 880, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1–A13) is reported at 366 F. 2d 642. The findings of fact, conclusions of law, and order of the Board (J.A. 960–1049)[1] are reported at 153 NLRB 204.

[1] "J.A." refers to the "Joint Appendix," filed in the court of appeals. "G.C. Exh." refers to General Counsel's Exhibit 66A, the relevant portions of which are printed in the Appendix *infra*, pp. 13–14.

JURISDICTION

The decision of the court of appeals was rendered on August 16, 1966, and the decree was entered on September 28, 1966 (Pet. A1, A14–A15). By orders dated December 19, 1966, and January 25, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including February 11, 1967. The petition was filed on February 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 29 U.S.C. 160(e).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. A16–A17 of the petition.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly concluded that certain individuals who were engaged in organizational and related work for an international union were employees of that union and comprised a unit appropriate for collective-bargaining purposes.

2. Whether the Board committed prejudicial error in revoking the union's subpoena.

STATEMENT

Petitioner Retail Clerks International Association, AFL–CIO ("RCIA"), is a labor union engaged throughout the United States in organizing employees working in the retail trades, and in representing them for collective-bargaining purposes. It has about

400,000 members, 300 chartered local union affiliates, including Petitioner Local 880, and about 10 District Councils, composed of varying numbers of locals (J.A. 961, 974; 605–607). The Agents and Organizers Association ("AOA") is a labor organization engaged in organizing and representing for collective-bargaining purposes persons employed as agents or representatives by local, national, or international labor unions and its membership is so limited (J.A. 963–964, 969; 13–15, 841–842). In December 1962, AOA demanded recognition from RCIA as the collective-bargaining representative of persons employed by RCIA as International Representatives and Council Organizers in three geographical areas (J.A. 969–970; 18–19, 870–874). The Board found that, by refusing this request, RCIA violated its bargaining obligation under Section 8(a) (5) and (1) of the Act. The Board also found that RCIA and its Local 880 committed numerous independent violations of Section 8(a) (1) of the Act, by threatening representatives and organizers with job loss if they joined AOA (J.A. 1030, 1033, 1041). The facts pertinent to the principal issue presented in this Court are as follows:

1. *The International Representatives.*—The supreme governmental powers of RCIA are vested in its President and in an Executive Board composed of the President, Secretary-treasurer, and seven Vice-Presidents. Since the Executive Board meets only periodically, the President exercises the ultimate day-by-day supervisory power, assisted by a large staff located in RCIA's main office in Washington, D.C. (J.A. 971,

972–973; 611–613, 616, 618–626, 628–630, 634–635, 938–940).

The basic organizing work of RCIA is carried out mainly through seven Regional Divisions, each under the supervision of a director appointed by the President. Directors usually are also Vice-presidents of RCIA and are therefore members of the Executive Board (J.A. 961, 973–974; 37, 97, 606–610, 634–635). The directors interview prospective International Representatives, and effectively recommend to the President their starting salaries, whether they should be given salary increases or time off, and whether they should be discharged. Representatives are hired on a full time basis at salaries usually ranging from $75 to $125 per week, are prohibited from accepting outside employment, and are assigned to a particular Regional Division under the supervision of its director (J.A. 975–977, 979, 985–986; 35–38, 46–47, 49–50, 93–98, 100–101, 117–121, 139–144, 148–149, 171–175, 216, 240–242, 258–260, 299–300, 335, 481–482, 515–516, 577, 624–626, 637–638, 640–641, 749, 891–894, 902, 904–906). Representatives spend most of their time organizing retail employees pursuant to the assignments and instructions of their director. Assignments and instructions vary in detail, depending upon the circumstances, the judgment of the director, and the experience of the representative. In addition to frequent informal contacts with the director, all representatives submit to him three weekly reports, detailing their daily activities, their success or failure in organizing employees, and their expenses. The director, in turn, reviews these reports, praises or

criticizes the work of the representatives, corrects their expense accounts, and, when necessary, issues new or modified instructions (J.A. 977–981; 38–39, 41–46, 51, 82, 87–88, 104, 122–124, 135–136, 144–148, 158–159, 161–163, 174–175, 215–218, 236–238, 241–243, 259–260, 290–291, 315, 332, 334–335, 362–365, 408–409, 516–517, 877, 892–901, 907–913, 919–922). Representatives occasionally select organizational targets on their own. But their directors keep a close rein over their activities through the normal contacts and weekly reports described above (J.A. 980–981; 39–41, 135–136, 351, 486).

Besides organizing, some representatives spend a portion of their time at various other tasks (J.A. 981–985). For example, representatives assist in contract negotiations, strikes and picketing. RCIA's Collective Bargaining Department promulgates the standard contract clause; the President must approve the contracts to assure compliance with established RCIA policy; and strikes and picketing must be authorized by RCIA's Executive Board (J.A. 972, 981–982; 52–53, 91, 158–159, 275, 276, 355–356, 360–361, 491–492, 522–523, 614, 671, 721, 726–727; G.C. Exh. 66A, *infra,* pp. 13–14). Representatives also file charges and petitions with the Board, usually after consultation with their directors or staff counsel; they act as deputy trustees for the daily affairs of local unions, normally under their director as trustee; and they give general assistance to local unions, which action is ordinarily reported to the director and does not involve the issuance of orders to local personnel (J.A. 982–984; 51–52, 77–78, 81–82, 136–137, 145–146,

161–163, 178–179, 217–218, 290–292, 335, 656–657, 671–672, 718–719, 733).

2. *The Council Organizers.*—In addition to the Regional Divisions, there are eight to ten District Councils within those Divisions. The councils perform for the small local unions the organizing and servicing functions which they are unable to carry out themselves (J.A. 986–987; 331–332, 347, 455–456, 502–503).[2] RCIA determines the need for and establishes the District Councils, requires all locals in areas assigned to a council to become affiliated with it, and empowers the councils to collect not less than 25 cents a year from the members of each local. Council funds are maintained and administered in RCIA's Washington office, where the councils' most important administrative functions are also performed (J.A. 986, 993; 450–451, 940–941). Each council has an executive board, which meets about three to six times a year and is comprised of council officers elected by local union delegates to the annual council convention (J.A. 988; 330, 449–450, 507–508). The day-to-day paperwork of the council is handled by its secretary-treasurer, who is its only full-time, paid officer (J.A. 988–989, 990–991; 449–451).

The organizing and servicing work of the council is carried out by Council Organizers (J.A. 987).[3] Appli-

[2] The larger locals employ their own business agents and organizers (J.A. 986–987). No issue involving them is presented here.

[3] The secretary-treasurer of the council sometimes engages in this work. When he does, he files weekly reports and maintains regular contact with the Director of the Regional Division, and is under direct supervision of the director or higher RCIA

cants for these jobs are initially interviewed by the Director of the Regional Division. If he approves the qualifications of an applicant, he recommends to the executive board of the district council that the applicant be hired. The executive board affirms the selection made by the director and the annual convention ratifies this action by "electing" the organizer (J.A. 989–990, 993–994; 320–330, 439–440, 485, 492–493). The salaries of council organizers are similarly established by the annual convention, subject to the approval of RCIA's President. Their pay and expense checks are drawn on council funds maintained in RCIA's Washington office, and are signed by RCIA's President and Secretary-treasurer (J.A. 987, 990, 993; 331–332, 456–457, 485, 498). Council organizers perform essentially the same work as International Representatives, carry the same credentials, receive their assignments from the Director of the Regional Division in which they work, submit to him the same weekly reports as International Representatives, are subject to his direct supervision, and are granted time off by him (J.A. 986–987, 992–993, 995; 48–49, 103–104, 179–182, 328–329, 331–335, 349, 440–443, 485–487). Council organizers are not supervised by and do not file reports with council personnel (J.A. 991, 993; 441–442, 444, 458, 496).[4]

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officials (J.A. 988, 990–991, 993–994; 328–329, 453, 458, 489–492, 499–501).

[4] In contrast, organizers and business agents employed by the local unions (*supra*, n. 2) are hired by, directly responsible to, and in regular contact with the local union officers, instead of the Directors of Regional Divisions. They are paid from local union funds by local union check (J.A. 987; 459, 471–474, 536, 537–538, 577, 587–588, 592–594, 779, 786).

3. *The Board and Court Decisions.*—Upon the foregoing facts, the Board found that RCIA was the employer of the International Representatives and Council Organizers; that these individuals were not managerial, supervisory, or confidential employees but ordinary employees within the meaning of the Act; and that they could appropriately be grouped in a unit for collective-bargaining purposes (J.A. 1007–1010). Accordingly, the Board concluded that RCIA, by refusing to recognize AOA as the representative of these employees even though it had been selected by a majority of them, violated Section 8(a) (5) and (1) of the Act (J.A. 1010–1021, 1030–1033). The Board's order, *inter alia,* required RCIA to cease and desist from the unfair labor practices found and to bargain with AOA upon request (J.A. 1041–1049). The court of appeals sustained the Board's findings, rejected petitioners' procedural contentions, and enforced the Board's order (Pet. A1–A13).

ARGUMENT

The decision of the court below turns on the particular facts of this case, is not in conflict with the decision of any other court of appeals, and presents no issue warranting further review.

1. It is undisputed that "when a labor union takes on the role of an employer the Act applies to its operations just as it would to any other employer." *Office Employes International Union* v. *National Labor Relations Board,* 353 U.S. 313, 316. The record—summarized in pertinent part at pp. 2–7, *supra*—fully supports the Board's findings (J.A. 974–975, 1007–

1008), sustained by the court below (Pet. A2–A6, A7–A9), that the International Representatives and Council Organizers are the equivalent of RCIA's "production workers," performing the day-to-day tasks of organizing and providing bargaining services for retail employees, pursuant to the instructions and supervision of RCIA's top officials. The position of these individuals vis-à-vis the management of RCIA is substantially the same as that of other organizational workers who have been held to be employees within the meaning of the Act, and thus entitled to bargain collectively with their union employers.[5] Petitioners' arguments to the contrary are without merit:

(a) Petitioners contend (Pet. 14–17) that since the council organizers are "elected" by the council convention (*supra*, p. 7), they are not employees of RCIA. The existence of an employer-employee relationship is "essentially a factual issue," however, depending upon the "indicia of control." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481. Here the record shows (*supra*, pp. 6–7, J.A. 996–999) that prospective council organizers are first interviewed by RCIA's Regional Division Director, and if he recommends them to the district council, their election by the council convention follows as a matter of course. The Board properly found on this evidence that the acts of the convention (R. 995–996) "were more formal acts than they

[5] See *International Ladies Garment Workers' Union* v. *National Labor Relations Board*, 339 F. 2d 116 (C.A. 2); *American Federation of Labor*, 120 NLRB 969; *Air Line Pilots Association*, 97 NLRB 929; *International Ladies' Garment Workers' Union*, 131 NLRB 111; *Textile Workers Union of America*, 138 NLRB 269.

were realities and more acts of ratification than of initiation." Indeed, the council organizers perform the same tasks and carry the same credentials as international representatives; they are under the same continuous control of RCIA's division directors and are not supervised by any district council personnel; their salaries are subject to the approval of RCIA's president and are paid from funds controlled by RCIA's Washington office. The court below was thus fully warranted in concluding that (Pet. A8) "substantial evidence supports the [Board's] finding" that RCIA "actually and effectively employed" the council organizers.[6]

(b) Petitioners contend (Pet. 23–24) that the Board's finding that the international representatives were ordinary, rather than managerial,[7] employees is invalid because the Board made its finding on the basis of the work of the representatives as a "class," without considering the individual differences among them. There is no substance to this contention. While the Board did not mention each representative by name, the record shows that it specifically considered those functions on which petitioners now rely as establishing that some representatives are so closely allied with management that they should be classified as

[6] Since RCIA, and not the district council, is in reality the employer of the council organizers, and the Board's order runs against RCIA and not against the district councils, it follows that the Board did not violate the requirements of due process (see Pet. 18–20) in failing to join the district councils as parties to its proceeding.

[7] The Board excludes managerial employees from a bargaining unit (see Pet. A4–A5).

managerial employees (R. 981–985; cf. Pet. 12–13). Notwithstanding such consideration, the Board found (R. 1008) that all the representatives were "employees under the Act * * * not managerial * * * employees." In sustaining the Board's finding that the international representatives were not managerial employees, the court of appeals did not depart from the rationale given by the Board (see Pet. 24). It applied to the facts here the very same precedents relied upon by the Board (Pet. A3–A5; R. 1007–1008).[8]

2. There is likewise no substance to petitioners' contention (Pet. 20–22) that the Board's order should have been set aside because of the action of the Trial Examiner in revoking RCIA's subpoena which had sought evidence that AOA was a rival political group within RCIA (J.A. 281). The court below properly held (Pet. A13) that, at most, the revocation was "harmless" error. Since AOA undisputedly "limits membership to organizing employees, and the number of these in a 400,000 member [retail employee] union is small," the "likelihood of the AOA representing a threat of any significance to the present International management would seem minimal." Moreover, RCIA "is free to seek relief from the Board in the future if its fears * * * prove well founded" (Pet. A13). See *International Ladies' Garment Workers'*

[8] See, *e.g.*, *American Federation of Labor*, 120 NLRB 969, 973: "The Board has held, in essence, that managerial employees are those who formulate, determine, and effectuate an employer's policies."

Union v. *National Labor Relations Board*, 339 F. 2d 116, 124 (C.A. 2).*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1967.

* *Bausch & Lomb Optical Co.*, 108 NLRB 1555, and *National Labor Relations Board* v. *David Buttrick Co.*, 361 F. 2d 300 (C.A. 1), do not support petitioners' assumption (Pet. 21–22) that proof of AOA's political motive would automatically establish a defense to RCIA's refusal to bargain with AOA. Both cases involved the question whether a union could properly represent employees where it was in direct or indirect business competition with the employees' employer. No such problem is involved here. Moreover, *Bausch & Lomb* was expressly limited to its "unique" facts (108 NLRB at 1562), and *Buttrick* merely held that the Board should consider the potential conflict-of-interest (361 F. 2d at 309).

APPENDIX

General Counsel's Exhibit 66A

Retail Clerks International Association

Constitution

* * * * *

Section 11. Duties of International Executive Board.—

* * * * *

(C) The International Executive Board shall have power to authorize strikes in conformity with the Constitution and Laws of the International Association * * *

Any authorization of strike action under this or any other section of the International Constitution in respect to any Local Union or District Council is contingent upon such Local Union or District Council disclosing all relevant facts relating to the proposed strike and the reasons and justification therefor. Any authorization obtained without such full disclosure shall be considered not to have been given.

* * * * *

Section 40. Collective Bargaining Contracts

(A) No collective bargaining contract made by a Local Union shall be recognized by the International Association unless the substantive terms thereof are approved by the International President. Such approval shall be for the purpose of determining whether the aforementioned terms conform to the ap-

plicable established policies, practices and objectives of the International Association * * *

* * * * *

(E) 1. No strike or other economic action shall be taken by any Local Union in connection with a contract proposal, unless the affected membership * * * has approved * * *

* * * * *

3. Upon approval of a strike or other economic action by a Local Union, the chief executive officer of the Local Union, in requesting authorization from the International President to strike or take other economic measures, shall advise him of the action taken by the affected membership * * * together with other pertinent facts. * * * No Local Union shall engage in a strike or other economic measures without first receiving the authorization of the International President. * * *

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